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No. _____

Supreme Court, U.S.
FILED
MAR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

MOUNT WASHINGTON CEMETERY, et al,

Petitioners,

v.

MONUMENT BUILDERS OF GREATER KANSAS CITY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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March 7, 1990

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QUESTION PRESENTED

1. How does a federal court determine "the judicial district . . . in which the claim arose" under the "claim arose" provision of the general venue statute, 28 U.S.C. § 1391(b)?

LIST OF PARTIES and RULE 29.1 LIST

The plaintiff-appellant in the proceedings below was a trade association of independent grave marker builders and dealers.[1] The defendants-appellees were 17 Missouri cemeteries,[2] 13 Kansas cemeteries,[3] the national cemetery association,[4] two state cemetery associations[5] and a national manufacturer of bronze monuments.[6]

The petitioners before this Court are nine of the Missouri cemeteries: Mount Washington Cemetery; The

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[1] Monument Builders of Greater Kansas City, Inc.

[2] D. W. Newcomer's Sons, Woodlawn Cemetery of Independence, Missouri, The Temple, Congregation B'nai Jehudah, Mt. Washington Cemetery, Catholic Cemeteries Associated, Diocese of Kansas City – St. Joseph, Inc., Reorganized Church of Jesus Christ of Latter Day Saints, Glenridge Cemetery, Inc., Lincoln Cemetery, Inc., Memorial Park Cemetery Association of Missouri, Memorial Heritage, Inc., Troost Avenue Cemetery Co., Elmwood Cemetery, East Slope Memorial Gardens Cemetery, The Brooking Cemetery Assn., Blue Ridge Lawn Cemetery, Inc., Highland Sales & Investment Company, Inc., Mount Moriah Cemetery, Inc.

[3] Shawnee Mission Memory Gardens, Pleasant View Cemetery, City of Olathe, Kansas, Oak Lawn Memorial Gardens, Mount Muncie Cemetery, Mount Calvary Cemetery, Catholic Cemeteries – Archidiocese of Kansas City, Kansas, Memorial Park Cemetery, Sunset Memorial Gardens, Maple-Hill Cemetery Company, Highland Park Cemetery and Chapel Mausoleum, Inc., Chapel Hill Memorial Gardens, Inc., Sunset Memory Gardens of Leavenworth.

[4] American Cemetery Association.

[5] Cemetery Association of Missouri and Cemetery Association of Kansas.

[6] Jas. H. Mathews & Co.

LIST OF PARTIES and RULE 29.1 LIST – Continued

Brooking Cemetery Association; Catholic Cemeteries Associated, Diocese of Kansas City-St. Joseph, Inc.; Memorial Heritage, Inc.; Reorganized Church of Jesus Christ of Latter Day Saints; Blue Ridge Lawn Cemetery, Inc.; Highland Sales and Investment Company, Inc.; Memorial Park Cemetery Association of Missouri; and The Temple, Congregation B'nai Jehudah.[7]

The respondent before this Court is Monument Builders of Greater Kansas City, Inc.

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[7] Petitioners believe that the remaining plaintiffs-appellants in the proceedings below have no interest in the outcome of the petition. Petitioners have accordingly notified those parties of that belief. *See* Sup. Ct. R. 12.4.

Petitioners have no parent or nonwholly owned subsidiaries to list pursuant to Rule 29.1.

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MOUNT WASHINGTON CEMETERY, et al,

Petitioners,

v.

MONUMENT BUILDERS OF GREATER KANSAS CITY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on December 19, 1989.

OPINIONS BELOW

The memorandum decision of the United States District Court for the District of Kansas (Saffels, D.J.) is

reported at 629 F. Supp. 1002, and is reprinted in the appendix hereto, p. 1a, *infra*.

The opinion of the Court of Appeals for the Tenth Circuit is reported at 891 F.2d 1473, and is reprinted in the appendix hereto, p. 23a, *infra*.

JURISDICTION

The Tenth Circuit's opinion and judgment was rendered on December 19, 1989. *See* p. 23a, *infra*, No petition for rehearing was sought. At petitioners' request, however, the Tenth Circuit has stayed the issuance of its mandate.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1391(b). Venue generally

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

STATEMENT OF THE CASE

Monument Builders' Claims

This is a civil antitrust action brought in the District of Kansas by respondent Monument Builders of Greater

Kansas City, Inc. ("Monument Builders")[1] against thirty cemeteries,[2] three cemetery associations and a bronze monument manufacturer. As explained by the Tenth Circuit, "[a]t the heart of Monument Builders' complaint is a conspiracy among the various defendants to drive independent sellers of grave markers out of the [Greater Kansas City] market by forcing purchasers of cemetery plots to buy their marker from the cemetery of their choice." *See* p. 27a, *infra*.

Specifically, Monument Builders alleges in Count I of its amended complaint that the thirty cemeteries horizontally conspired to illegally tie the sale of burial plots to cemetery lots in violation of section 1 of the Sherman Act. Count II alleges a vertical conspiracy whereby the three cemetery associations and the bronze monument manufacturer conspired with the individual cemeteries "by advising, coordinating, and encouraging them to implement the challenged practices" in violation of section 1 of the Sherman Act. *See* p. 28a, *infra*. Finally, in Count III, Monument Builders alleges that these activities constitute "a conspiracy and/or attempt" by all of the defendants to monopolize the market for grave markers in violation of section 2 of the Sherman Act.

Monument Builders made the following allegations under the heading "JURISDICTION AND VENUE":

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[1] Monument Builders is a trade association of independent grave marker builders and dealers. It brought this action on behalf of its four members, three of which are located in Missouri; only one of which is located in Kansas.

[2] A majority (seventeen) of the cemeteries are located in Missouri; thirteen are located in Kansas.

> 8. Jurisdiction of this Court is founded upon 28 U.S.C. §§ 1331 and 1337(a), and upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and under the Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2.
>
> 9. Defendants transact substantial amounts of business and are found within the District of Kansas, and the conduct complained of occurred, in whole or in part, within the District of Kansas.

At no point in its amended complaint does Monument Builders make any specific allegations as to dates or locations of conspiratorial meetings, percentage of sales across the Missouri/Kansas state line, etc.

The Missouri Cemeteries Challenge Venue

Twelve of the Missouri cemeteries responded to Monument Builders' amended complaint by filing, *inter alia*, motions to dismiss for improper venue. In relevant part, the Missouri cemeteries alleged that venue could not lie under the "claim arose" provision of the general venue statute, 28 U.S.C. § 1391(b), because the claim as to them arose in Missouri.[3] Each of the cemeteries supported their motions with affidavits which "verif[ied] that none of the defendants maintained offices or agents or employees in Kansas or actively solicited or conducted any business in

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[3] The Missouri cemeteries also alleged that venue was improper under sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 & 22, as well as under the "residence" provision of the general venue statute, 28 U.S.C. § 1391(b). As noted below, *see* p. 6, *infra*, Monument Builders later conceded that venue was improper under these provisions.

Kansas [and] that the defendants neither owned any land nor leased any property in Kansas." *See* p. 6a, *infra*.

In response, Monument Builders argued that "even assuming arguendo that the [Missouri] defendants have not directly transacted business in the forum [district], their alleged misconduct has affected a marketplace which includes the forum state." *See* Monument Builders' Response to Missouri Cemeteries' Motions to Dismiss for Improper Venue, at 4. Additionally, Monument Builders asserted that because it alleged a broad conspiracy among all the defendants, venue was proper in the District of Kansas.

> Furthermore, the plaintiffs in this action have alleged conspiracy in restraint of trade under the Clayton Act and Sherman Antitrust Act. Assuming arguendo that the above-named defendants in this case did not themselves act in the forum state, by reason of conduct in the state in furtherance of the conspiracy by defendants residing within the forum state, this Court should uphold . . . venue. . . .

Id. at 6. Monument Builders submitted no counter-affidavits in response to the affidavits of the Missouri cemeteries.

The District Court Dismisses the Missouri Cemeteries

The district court, Judge Dale E. Saffels, granted the Missouri cemeteries' motions to dismiss for improper venue. The court began by noting that since Monument Builders had not controverted any of the facts set forth in the affidavits of the Missouri cemeteries, it had little trouble "find[ing] that not one scintilla of evidence has been proffered which demonstrates that any of the [Missouri] defendants were 'transacting' business or 'found'

in the state of Kansas". *See* p. 5a, *infra*. The court similarly made short shrift of Monument Builders' argument that venue was properly laid in Kansas under the "claim arose" provision of the general venue statute. "The court finds that plaintiff has not sufficiently alleged or proven facts which even *infer* that the violation of the antitrust laws by the [Missouri] defendants occurred in Kansas." *See* p. 4a, *infra* (emphasis added).

The Tenth Circuit Reverses

On appeal to the Tenth Circuit, the court of appeals reversed. The court first noted that Monument Builders had abandoned its arguments that venue was appropriate under the special antitrust venue provisions of the Clayton Act, as well as under the "residence" provision of the general venue statute. *See* p. 31a, *infra*. Accordingly, the only claim before the court was Monument Builders' assertion that venue was proper under the "claim arose" provision of the general venue statute.

In reversing the district court as to this issue, the court relied upon this Court's decision in *Leroy v. Great United Western Corp.*, 443 U.S. 173 (1979), where Justice Stevens noted, in dictum, that in an "unusual case" a claim may arise in more than one district. Seizing upon this language, the Tenth Circuit concluded that this was one of those "unusual cases." Specifically, the court found that Monument Builders' claim "arises not from an individual cemetery's sale of graves, but from the alleged illegal conduct's adverse impact on consumer welfare within the relevant market. Because this market covers both Kansas and Missouri, the alleged antitrust violation

occurs in both Kansas and Missouri." *See* p. 33a, *infra*. Continuing, the court found that as between the District of Kansas and the Western District of Missouri, "[t]he availability of witnesses and the accessibility of relevant evidence argue as plausibly for venue in Kansas as in Missouri." *See* p. 37a, *infra*. Accordingly the Tenth Circuit reversed the district court's order.

At petitioners' request, the Tenth Circuit has stayed the issuance of its mandate. Accordingly, the case has not been returned to the district court.

REASONS FOR GRANTING THE WRIT

I.

Lower courts are hopelessly confused as to the proper test to apply in determining "the district . . . in which the claim arose."

Petitioners submit that lower courts, including the Tenth Circuit[4], are hopelessly confused as to the proper test to apply in determining, for venue purpose under the general venue statute, "the district . . . in which the claim arose." Furthermore, petitioners submit that this Court's decision in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) – rather than resolve the confusion – has only added to it. *See Dody v. Brown*, 659 F. Supp. 541, 547 (W.D. Mo. 1987) ("[N]ot only did *Leroy* not provide a clear standard for determining where a claim arose, but it also has opened the way for a number of confusing and inconsistent standards as to where a claim arises under

[4] The Tenth Circuit expressly noted in its opinion that the case presented "a difficult venue issue." *See* p. 30a, *infra*.

§ 1391(b)."); *Pfeiffer v. International Academy of Biomagnetic Medicine*, 521 F. Supp. 1331, 1343 (W.D. Mo. 1981) ("This Court is not alone in its frustration and confusion over what standard should be applied for determining where a claim arose under the federal venue statutes since the *Leroy* decision."); *Cheeseman v. Carey*, 485 F. Supp. 203, 213 (S.D.N.Y.), *remanded on other grounds*, 623 F.2d 1387 (2d Cir. 1980) ("The difficulties posed by *Leroy* seem certain to make venue issues an even greater problem for the lower federal courts than they were before the Supreme Court spoke.").

The commentators are similarly confused. *See* 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3806, at 54 (1986) ("The Leroy decision did not resolve uncertainty on the most difficult and important question of all, where does a claim arise."); 1A J. Moore, W. Taggart, A. Vestal, J. Wicker, B. Ringle, Moore's Federal Practice ¶ 0.342 [.5-2-2], at 4161 (2d ed. 1989) ("[T]he Court did not explain the effect of its decision on the various tests previously used by the lower courts in construing the "claim arose" language. Consequently, much dispute exists in the lower courts as to the proper test."); Case Note, 31 S.C. L. Rev. 579, 580 (1980) ("[The] principal significance [of *Leroy*] arises from its failure to eradicate the uncertainties that have surrounded evocations of venue in the 'district . . . in which the claim arose.' ")

Prior to *Leroy*, the federal lower courts had variously applied at least three tests to aid them in determining the district in which the claim arose: the "weight of the contacts" test, the American Law Institute ("ALI") test

and the "place of impact" or "place of injury" test.[5] A brief summary of each test follows.

A. Weight of the Contacts Test

The weight of the contacts test is the most widely used test for determining the district in which the claim arose. *See Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 855 (11th Cir. 1988). Under that test, "which was probably borrowed from the area of conflicts of law," *see* Wood, *Federal Venue: Locating the Place Where the Claim Arose*, 54 Tex. L. Rev. 392, 403 n. 71, (1976), the court weighs the contacts which the defendant has with the forum district against the contacts which the defendant has with another district. If the most significant contacts are in the forum district, that is the district in which the claim arose. If another district is the situs of the most significant contacts, it is the district in which the claim arose.

B. The ALI Test

The ALI test is merely an extension of the weight of the contacts test. *See Dody v. Brown*, 659 F. Supp. 541, 547 (W.D. Mo. 1987). Under this test, venue is appropriate in *any* district in which "a substantial part of the events or omissions giving rise to the claim occurred." *See* ALI Study of the Division of Jurisdiction Between the State and Federal Courts §§ 1303, 1314 (1969). Thus, under the

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[5] This test appears to be the test applied by the Tenth Circuit in the instant case. *See* pp. 11-12, *infra*

ALI test, venue might be appropriate in several districts, so long as significant activities occurred in each district.

C. The Place of Impact or Place of Injury Test

The third major test is the place of impact or place of injury test. As one might surmise, this test is most frequently applied in tort cases. *See Pfeiffer v. International Academy of Biomagnetic Medicine*, 521 F. Supp. 1331, 1339 (W.D. Mo. 1981). Under this test, venue is proper in the judicial district in which the impact of the defendant's actions are felt. This test has been criticized, however, as unduly favoring the convenience of the plaintiff. "A plaintiff most frequently will experience injury in the district where he resides, and that district generally will be most convenient for the plaintiff to bring suit." Case Note, 31 S.C. L. Rev. 579, 587 (1980).

As noted above, *Leroy* did not resolve the question of which of these three tests should be used. Because of that omission, lower courts continue to use each of the three test results set forth above – with equally inconsistent results. In addition, several courts have interpreted *Leroy* as suggesting that the geographical convenience to the defendant is the *only* consideration in deciding proper venue. Specifically, these courts ignore the relationship between the forum district and the claim and look solely to the geographical convenience of the forum district to the defendant and its witnesses. *See Maybelline Co. v. Noxell Corp.*, 813 F.2d 901, 906 n. 8 & 907 (8th Cir. 1987) (applying *Leroy* test); *American Carpet Mills v. Gunny Corp.*, 649 F.2d 1056, 1059 (5th Cir. 1981) (finding that test exists, but refusing to apply it to particular case because

it was not "unusual"); *see also Dody v. Brown*, 659 F. Supp. 541, 549 (W.D. Mo. 1987) (discussing *Leroy* test).

Accordingly, the lower federal courts now have four tests from which to choose in determining whether venue is proper under the "claim arose" provision of the general venue statute. As a result, inconsistent venue decisions will continue to be made until this Court resolves this confusion.

II.

The instant case is an appropriate one for the Court to review because of the differing results which are obtained under the different venue tests.

Though it is far from clear, it would appear that the Tenth Circuit employed the place of impact test in finding that venue was appropriate in either Kansas or Missouri.[6] Specifically, the Tenth Circuit appears to have relied on the fact that the impact of the defendants' alleged conduct was felt in Kansas.

> Monument Builders' claim . . . is founded upon the allegation that through an illegal agreement or conspiracy, the Kansas and Missouri cemeteries in the greater Kansas City area are adversely affecting consumer welfare by foreclosing competition in the market for grave

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[6] At least one commentator has noted that courts which apply the place of impact test usually do not affix a label to their analytic approach. Wood, *Federal Venue: Locating the Place Where the Claim Arose*, 54 Tex. L. Rev. 392, 407 (1976). That is clearly the case here.

> markers and installation. . . . Because this market covers both Kansas and Missouri, the alleged antitrust violation occurs in both Kansas and Missouri.

See p. 33a, *infra*.

Petitioners submit that this result is at odds with the results of either the weight of the contacts test or the ALI test. As noted above, the district court expressly found – and the Tenth Circuit did not dispute – that the Missouri cemeteries "conclusively prove[d] that they own or lease no land in Kansas, have no agents, employees or offices in Kansas, neither advertise nor solicit business in Kansas, and are not licensed nor engaged in business in Kansas." *See* p. 5a, *infra*. As also noted above, other than its conclusory assertion that "the conduct complained of occurred, in whole or in part, within the District of Kansas," Monument Builders has not alleged any overt acts which any of the Missouri cemeteries committed in Kansas.

Petitioners submit that given this set of facts venue is improper under the weight of the contacts test. In *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252 (E.D. Pa. 1968), the first case to espouse this test, for example, the court explained that because no significant sales, conspiratorial meetings, etc. occurred in the Eastern District of Pennsylvania venue was improper there. Similarly, in *Athletes Foot of Delaware, Inc. v. Ralph Libonati Co.*, 445 F. Supp. 35, 45 (D. Del. 1977), the court dismissed the action for improper venue because there were "no allegations that conspiratorial meetings nor any overt act by [defendant] in furtherance

of the alleged conspiracy, [or substantial sales] occurred in this district."

Accordingly, if this case had been brought in either the First or Eleventh Circuits, for example, venue would have clearly been improper, because those circuits continue to adhere to the weight of the contacts test. *See Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 856 (11th Cir. 1988); *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 955-56 (1st Cir. 1984).

If, on the other hand, this action had been brought in the Eight Circuit, venue would be appropriate in Kansas under the geographical convenience test that circuit adopted following *Leroy*. *See Maybelline Co. v. Noxell Corp.*, 813 F.2d 901 (8th Cir. 1987). This is so because the two districts are adjoining and the two courthouses are separated by short distances.

Finally, if this action had been brought in the Fifth Circuit, it is impossible to predict whether venue would be proper because that circuit has stated that it would apply the *Leroy* test in a truly "unusual case," but did not define what an "unusual case" is. *See American Carpet Mills v. Gunny Corp.*, 649 F.2d 1056, 1059 (5th Cir. 1981).

Because the facts of this case allow for differing results depending on the test used, petitioners submit that the instant case is an appropriate case for this Court to review in the context of deciding upon the appropriate test for determining venue under the "claims arose" provision of the general venue statute.

CONCLUSION

Accordingly, petitioners respectfully urge this Court to grant certiorari to resolve the rampant confusion which exists among the lower courts as to the proper test to employ in determining the "district . . . in which the claim arose." Petitioners submit that in the ten years since *Leroy* has been decided the lower courts have been unable to formulate a consistent approach to this issue. Accordingly, it appears that the only way in which this issue can be resolved is for this Court to grant certiorari and define the appropriate test to employ to resolve this all too frequent issue.

Furthermore, petitioners submit that the instant case is an appropriate case for this Court to employ to do that because the facts of this case are such that differing results occur under the various test now in use in the various circuits. Accordingly, the Court can employ this case to itself "test" the various tests in order to make an intelligent choice among the many options available to it.

Respectfully submitted,

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March 7, 1990

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MONUMENT BUILDERS OF GREATER KANSAS CITY, INC., Plaintiff,	CIVIL ACTION
v.	NO. 84-2469-S
AMERICAN CEMETERY ASSOCIATION, et al., Defendants.	FILED FEB 26 1986

MEMORANDUM AND ORDER

This matter is before the court on various defendants' motions to dismiss plaintiff's amended complaint for failure to state a claim upon which relief may be granted. Several defendants have also filed motions to dismiss for improper venue, lack of personal jurisdiction, and insufficiency of service of process. Additionally, motions have been filed by various defendants for sanctions against plaintiff pursuant to Rule 11, Federal Rules of Civil Procedure.

As stated in the court's memorandum and order dated June 28, 1985, plaintiff is a trade association of monument builders who filed a complaint alleging that defendants violated the antitrust laws by establishing a tying arrangement between the sale of cemetery lots and the sale and installation of graveside markers, by conspiring among themselves to tie these products, and by attempting to monopolize the sale of bronze and granite

memorials. In its order of June 28, 1985, the court dismissed plaintiff's complaint for failure to state a claim upon which relief could be granted, but granted plaintiff leave to amend its complaint. Plaintiff did amend its complaint, and defendants now seek to dismiss plaintiff's amended complaint upon the same grounds.

The court has determined that oral argument would not be of material assistance in the determination of this matter. Rule 15(d), Rules of Practice of the United States District Court for the District of Kansas.

In considering a motion to dismiss, the factual allegations of the complaint must be taken as true and all reasonable inferences must be indulged in favor of the plaintiff. *Mitchell v. King*, 537 F.2d 385 (10th Cir. 1976); *Dewell v. Lawson*, 489 F.2d 877 (10th Cir. 1974). A complaint should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The question is not whether a plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

A. Defendants' Motions To Dismiss For Improper Venue, Lack of Personal Jurisdiction, and Insufficiency Of Service Of Process

Twelve defendants have filed motions to dismiss for improper venue, lack of in personam jurisdiction, and insufficiency of service of process. In disposing of such motions, the court will first address the issue of venue

and in doing so will treat similarly situated defendants as a class.

Defendants Temple B'Nai Jehudah, doing business as Rosehill Cemetery, and the Brooking Cemetery Association request that plaintiff's claims be dismissed with prejudice due to improper venue. Defendants contend that §4 of the Clayton Act (15 U.S.C. 15) provides that "(b) any person who shall be injured in whose business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found to have an agent . . . ."

Both defendants contend and plaintiff concedes that Temple B'Nai Jehudah and Brooking Cemetery Association do not "reside" in Kansas. Therefore, the ultimate test is whether these defendants are engaged in the "practical, everyday business or commercial concept of doing or caring on business 'of any substantial character' " within the district. *United States v. Scophony Corp.*, 333 U.S. 795, 807 (1948). Each of these two defendants contend, and support with affidavits, that they do not maintain offices or agents in the state, nor do they advertise or actively solicit business in Kansas. Defendants proffer conclusive evidence that they are not "transacting business" in the state of Kansas, and therefore Kansas is not the proper judicial district for plaintiff's action against them.

The court notes that the plaintiff does not even attempt to controvert defendants' affidavits or the facts stated therein. Rather, plaintiff suggests that venue

should be based on plaintiff's allegation that all defendants, located both in Missouri and Kansas, have conspired together to violate antitrust laws. The court must disagree. It is clear that venue may not be founded solely on allegations that a defendant was a member of a conspiracy and that a portion of the conspiracy took place in the forum district. *See Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953); *Williams v. Canon, Inc.*, 432 F. Supp. 376, 382 (C.D. Cal. 1977).

Plaintiff also proposes that §4 of the Clayton Act supplements the provisions of 28 U.S.C. 1391. Section 1391 provides that venue is properly brought in the judicial district where all defendants reside or where the claim arose. This argument does little to convince the court that venue is proper against these defendants. The court finds that plaintiff has not sufficiently alleged or proven facts which even infer that the violation of the antitrust laws by these two defendants occurred in Kansas. The court therefore finds that all causes of action against defendants Temple B'Nai Jehudah and the Brooking Cemetery Association should be dismissed with prejudice.

Defendants D.W. Newcomer's Sons; Catholic Cemeteries Association of Kansas City-St. Joseph, Inc.; Memorial Heritage, Inc.; Mount Washington Cemetery; Troost Avenue Corp.; Reorganized Church of Jesus Christ of Latter Day Saints; Elmwood Cemetery; Blue Ridge Lawn Cemetery, Inc.; Highland Sales and Inventory Co., Inc.; and Memorial Park Cemetery Association of Missouri, are all Missouri corporations who have filed similar motions to dismiss for improper venue. These defendants have all filed affidavits which conclusively prove that

they own or lease no land in Kansas, have no agents, employees or offices in Kansas, neither advertise nor solicit business in Kansas, and are not licensed nor engage in business in Kansas.

Plaintiff contends that venue is proper pursuant to 15 U.S.C. 22, which provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.
>
> (Oct. 15, 1914, c. 323, § 12, 38 Stat. 736.)

The Supreme Court in the decision of *United States v. Scophony Corp.*, 333 U.S. 795 (1948), sought to define the terms used in §12 of the Clayton Act (15 U.S.C. 22). The court found that the words "transacts business" is given a much broader meaning for establishing venue than the concept of "found" under 28 U.S.C. 1391. The court found that the "everyday business" or commercial concept of "doing business of any substantial character" is the test to determine venue under §12 of the Clayton Act.

After reviewing the affidavits of the defendants, the court finds that not one scintilla of evidence has been proffered which demonstrates that any of the defendants were "transacting business" or "found" in the state of Kansas for purposes of the venue provisions of 15 U.S.C. 22 or 28 U.S.C. 1391. Each of the affidavits of the defendants verify the fact that none of the defendants maintained offices or agents or employees in Kansas or

actively solicited or conducted any business in Kansas. The affidavits established that the defendants neither owned land nor leased property in Kansas. The court therefore finds that the motions of defendants D.W. Newcomer's Sons; Mount Washington Cemetery; Catholic Cemetery Association of Kansas City-St. Joseph, Inc.; Reorganized Church of Jesus Christ of Latter Day Saints; Memorial Heritage, Inc.; Troost Avenue Cemetery Company; Elmwood Cemetery; Blue Ridge Lawn Cemetery and Highland Sales and Inventory Company to dismiss for improper venue should be granted.

The court also notes that in addition to arguments for improper venue, D.W. Newcomer's Sons has alleged that plaintiff has sued the wrong entity because Newcomer's does not own Floral Hills Funeral Home and Cemetery, Floral Hills East Cemetery and Cameron Memory Gardens, but rather that it owns all stock of Floral Hills Property Corporation. Florals Hills Property Corporation is a Missouri corporation which owns Floral Hills, Lee's Summit Cemetery, Floral Hills Cemetery and Cameron Memory Gardens. The court notes that plaintiff does not allege any type of alter ego doctrine which would tie D.W. Newcomer's Sons partnership with the separate corporate entity of Floral Hills Properties Corporation. The court finds further support for its determination that D.W. Newcomer's Sons is an improper party and should be dismissed from this case.

Similarly, Memorial Heritage, Inc. states that it was improperly named by plaintiff as a party defendant. Plaintiff alleged in its amended complaint that Memorial Heritage, Inc. was a defendant "cemetery operator" doing business as Barry Memorial Gardens, White Chapel

Memorial Gardens, Summit Heights Memorial Gardens, and Johnson County Memorial Gardens. While Memorial Heritage, Inc. does own and operate Barry Memorial Gardens, White Chapel Memorial Gardens and Summit Heights Memorial Gardens, Johnson County Memorial Gardens is owned and operated by Johnson County Memorial Gardens, Inc., a Kansas corporation. Defendant Memorial Heritage, Inc. concedes that it owns the stock of Johnson County Memorial Gardens, Inc., but contends that Johnson County Memorial Gardens maintains separate books and has a separate legal entity as a corporation. Again, plaintiff has not alleged any jurisdiction or venue over Memorial Heritage, Inc. because of its ownership of stock of the Kansas corporation or under the alter ego doctrine. Plaintiff's amended complaint and its memoranda in opposition to defendants' motions to dismiss neglects to allege that venue is properly grounded upon the alter ego doctrine. The court therefore finds that plaintiff has provided Memorial Heritage, Inc. with an additional basis for dismissal.

The court finds it is unnecessary to determine the personal jurisdiction and sufficiency of service of process issues at this time, as extra-territorial service of process in antitrust suits is proper only if venue lies in the forum district. In *Athletes Foot of Delaware v. Ralph Libonati Co.*, 445 F. Supp. 35, 45 (D. Del. 1977), the court stated that "although § 12 of the Clayton Act permits process in antitrust litigation against a corporation to be served 'in the district of which it is an inhabitant, or wherever it may be found,' service beyond state boundaries is authorized only when there is proper venue." *Id. See also Bruner v. Republic Acceptance Corp.*, 191 F. Supp. 200, 205 (E.D.

Ark. 1961). Accordingly, the court will not address the issues of personal jurisdiction or sufficiency of service based on the court's finding that defendants' motions to dismiss for improper venue should be granted.

Defendant City of Olathe has filed a motion to dismiss on two grounds. First, the City of Olathe claims that it is not liable for damages under Counts 1 through 3 of plaintiff's amended complaint due to the recent enactment of the Local Government Antitrust Act of 1984, Public Law 98-544, House Report No. 98-1158. This Act immunizes local governments from judgment for damages on actions claiming violations of federal antitrust law and also prohibits awards of attorneys' fees in such cases. Plaintiff, in its memorandum in opposition to defendant's motion to dismiss, does concede that the defendant City is immunized with respect to any damages plaintiff may have suffered after the effective date of the act. Plaintiff contends, however, that the act does not immunize municipal bodies from injunctive relief under the antitrust laws.

The second basis upon which the City of Olathe bases its motion to dismiss is that injunctive relief would not be available against the City based on the Eighth Circuit's decision in *Rosebrough Monument Co. v. Memorial Park Cemetery*, 736 F.2d 441 (8th Cir. 1984). In that case, the court found that cemeteries may set reasonable guidelines for the installation of memorials by outside monument companies. The defendant City of Olathe states that it reviewed the perimeters of the *Rosebrough* decision and adopted rules and regulations which permit outside monument companies to install the standard grade memorials or markers in Olathe Memorial Cemetery. Defendant City

of Olathe contends that these rules and regulations are in complete compliance with both the letter and the spirit of the court's ruling, and therefore the court should rule as a matter of law that no antitrust violation is present in connection with this operation of Olathe Memorial Cemetery. Thus, the City of Olathe contends that no injunctive relief can be rendered against said defendant.

After a review of both plaintiff's and defendants' memoranda, the court finds that a ruling on the merits of defendant City of Olathe's defense is not appropriate at this time. The court finds that under the standards established by the court in determining motions to dismiss, the defendant City of Olathe has not proved that plaintiff can establish no facts upon which to state a claim for relief. The court does find, however, that any claim against the City of Olathe for damages or attorneys' fees should be stricken. The court further finds that defendant City of Olathe's motion to dismiss or strike all claims for injunctive relief against it should be denied.

B. Count 1 Of Plaintiff's Amended Complaint

Count 1 of plaintiff's amended complaint alleges a horizontal conspiracy in violation of §1 of the Sherman Act against all defendants except defendant Jas. H. Matthews & Company. Plaintiff specifically alleges a tying arrangement under §1 of the Sherman Act (15 U.S.C. 1). As stated in the court's order dated June 28, 1985, to plead a per se illegal tying arrangement three essential elements must be alleged: (1) a tying-in between two

distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product; and (3) an effect on a non-insubstantial volume of commerce in the tied product market. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car,* 732 F.2d 1403, 1407 (9th Cir. 1984).

In its order dated June 28, 1985, the court previously found that plaintiff had failed to allege sufficient allegations of forcing and market power in its original complaint. The court finds that paragraph 24(i) of plaintiff's amended complaint alleges that defendants inter approximately seventy to seventy-five percent (70-75%) of all interments and control seventy to seventy-five percent (70-75%) of all memorials and markers and installation services. The court finds, however, that this allegation alone does not correct the defect of failing to allege control over cemetery plots in plaintiff's original complaint. The insufficiency of plaintiff's amended complaint with regard to its burden of alleging sufficient economic power in the tying market is glaring in light of the court's dismissal of twelve defendants for improper venue. The court finds absolutely no allegations in plaintiff's amended complaint which even infer that the remaining defendants have any type of economic power in the tying product market to impose the restrictions on the tied product as alleged in the amended complaint.

In addition, the court finds that plaintiff has not sufficiently alleged that consumers have lacked a choice of competitors or types of memorials. *See Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 11-12 (1984). Plaintiff did not amend its complaint to allege any additional facts as to the type of memorials sold, the prices

charged or the effect defendants' control has on the tied product market. Thus, the court finds that plaintiff has not sufficiently stated a cause of action for a per se illegal tying arrangement.

The second inquiry which must be made in the absence of a per se illegal tying arrangement is whether plaintiff has alleged sufficient facts to establish a cause of action that defendants unreasonably restrained competition. *Jefferson Parish*, 466 U.S. at 29. In paragraph 24(k), plaintiff alleges that since 1955 the number of independent monument dealers and their employees has decreased eighty to ninety percent (80-90%) and ninety percent (90%), respectively. The court finds that these statistics alone are not sufficient to support a claim of unreasonable restraint, even when viewed in the light most favorable to plaintiff. The plaintiff's amended complaint, in light of the dismissal of twelve defendants for improper venue, falls far short of alleging that the market has been unreasonably restrained, or there has been an adverse effect on competition due to the acts of the remaining defendants. Therefore, defendants' motions to dismiss Count 1 of plaintiff's complaint should be granted.

C. Count 2 Of Plaintiff's Amended Complaint

Count 2 of plaintiff's amended complaint alleges a vertical conspiracy in violation of §1 of the Sherman Act (15 U.S.C. 1). The court finds that plaintiff's amended complaint must measure up to the standards of pleading as set forth by the United States Court of Appeals for the

Tenth Circuit in *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1386-88 (10th Cir. 1980), and by the Fifth Circuit in *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 272-73 (5th Cir. 1979). Section 1 of the Sherman Act renders illegal every contract, combination and conspiracy in restraint of trade. *Larry R. George Sales Co.* at 273. To allege such a violation, plaintiff must plead facts constituting the conspiracy, the purpose of the conspiracy, and its accomplishment. *Id.* The court in *Larry R. George Sales Co.* further stated that "[i]t is essential that the complaint allege facts from which it can be determined that the conduct charged be in violation of the antitrust laws as reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." *Id.* (quoting *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 891, 893-94 (5th Cir. 1954)). Upon a review of plaintiff's amended complaint, and the court's dismissal of twelve defendants for improper venue, it appears beyond a doubt that plaintiff can prove no set of facts in support of its claim of conspiracy in restraint of trade. The facts as alleged cannot be read to infer agreement among the defendants to restrain trade and competition nor restrict the free flow of interstate commerce. *See, e.g., Norfolk Monument v. Woodlawn*, 394 U.S. 700, 704 (1969).

The court notes that plaintiff has failed to separately identify facts which establish the acts of conspiracy allegedly committed by the remaining defendants. Plaintiff has attempted to limit the time span to allege a four (4)-year span of conspiracy but has not alleged sufficient facts to enable each remaining defendant to responsively plead and defend against plaintiff's claim of conspiracy

to restrain trade. An allegation of a four-year span of time and general allegations of conspiracy do not correct the defects in plaintiff's complaint which were cited by the court in its Memorandum and Order dated June 28, 1985. The court therefore finds that Count 2 of plaintiff's complaint should be dismissed with prejudice.

D. Count 3 Of Plaintiff's Complaint

In Count 3, plaintiff alleges a conspiracy to monopolize and/or attempt to monopolize, in violation of §2 of the Sherman Act (15 U.S.C. 2). In *Olsen v. Progressive Music Supply, Inc.*, 703 F.2d 432 (10th Cir. 1983), the Tenth Circuit stated the elements needed to establish a claim based on an attempt to monopolize. First, plaintiff must demonstrate a dangerous probability of success. Second, plaintiff must prove acts in furtherance of the attempt, although these acts need not be successful. Third, plaintiff must demonstrate specific intent to monopolize. Fourth, a relevant market within which the attempted monopolization occurred must be established. *Id.* at 436-37. Upon a review of the record, the court finds that plaintiff has not sufficiently stated a cause of action upon which to claim an attempt of monopolization in violation of §2 of the Sherman Act. Plaintiff must establish possession or attempted possession by defendants of a monopoly power in a relevant market, and more importantly the *willful* acquisition of that monopoly power as distinguished from growth, or development or as a consequence of superior product, business acumen, or historical accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790, 791 (10th Cir.),

cert. denied, 434 U.S. 879 (1977); *Clark Equipment Co. v. Harlan Corp.*, No. 82-2049 (D. Kan., *unpublished,* Sept. 27, 1982), slip op. at 10.

The court finds that plaintiff's amended complaint, even when read in the light most favorable to plaintiff, does not sufficiently state market domination nor does it allege facts which establish that defendants willfully acquired or maintained such monopoly power with the specific intent to engage in anti-competitive activity. The court notes that nowhere does plaintiff allege that any of the defendants, including Jas. H. Matthews Company, hold market strength over granite markers. While plaintiff does state that defendants inter between 70-to-75% of the interments in the greater Kansas City area, no facts have been pleaded which specifically establish that defendants individually or collectively have the power to monopolize or have attempted to monopolize competition and that their acts in the past have been done for the willful acquisition of monopoly power. Further, the court's dismissal of twelve defendants for improper venue significantly negates any allegations supporting the probability of success of defendants or the relevant market within which the attempted monopolization occurred.

The court finds that plaintiff does not state sufficient facts to establish the market power of defendants in bronze markers or sufficient control over cemetery plots. The court notes that market shares alone are not enough to determine a defendant's capacity to achieve monopoly power. *See Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982). In conclusion, plaintiff's complaint does not sufficiently state facts from which the court can find that defendants have willfully acquired a

position of monopoly power, that defendants enjoy the necessary market domination for such a violation, or have the specific intent to monopolize.

Similarly, the court finds that plaintiff has not alleged sufficient facts to establish a conspiracy to monopolize. In *Olsen*, the Tenth Circuit stated the elements necessary to establish conspiracy to monopolize: (1) the existence of a combination or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) the effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. The court stated that the specific intent to monopolize is the heart of a conspiracy charge. *Id.* The court finds in the instant case that plaintiff's amended petition again falls short of meeting the standard for establishing the existence of a conspiracy to monopolize. The court finds that plaintiff has never alleged sufficient facts to tie the individual defendants together to effectuate their specific intent to monopolize the memorial industry. Further, in light of the court's finding that no relevant market power was shown, especially in the area of granite markers and the dismissal of twelve defendants, the strength of plaintiff's cause of action for conspiracy to monopolize is further negated. The court therefore finds that Count 3 of plaintiff's complaint for conspiracy and/or attempt to monopolize in violation of §2 of the Sherman Act should be dismissed with prejudice.

E. Motions For Sanction

Five defendants, Matthews Company, Elmwood Cemetery, City of Olathe, Highland Sales & Investment

Company and Blue Ridge Cemetery, have filed motions for sanctions pursuant to Rule 11, Federal Rules of Civil Procedure. Rule 11 provides, in part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The Notes of the Advisory Committee On Rules is instructive in setting a standard for the court to use in judging a pleading in light of the mandates established in Rule 11. The Committee suggests that the court should test the signer's conduct by inquiring into what was reasonable at the time the pleading was submitted, looking at such factors as the amount of time for investigation which was available to the signer, whether he had relied on client information as to the facts underlying the pleading, and whether the pleading was based on a plausible view of law. *Id.* In determining if sanctions should be imposed for plaintiff's allegations in its complaint and

second amended complaint, the court must resolve any doubts in favor of the signer.

In judging the pleadings in favor of the signer, the court finds that had plaintiff done sufficient investigation prior to the filing of the complaint or amended complaint and taken the time to allege sufficient allegations of market control of each of the individual defendants and the effect each would have on the relevant market for Count 1 of plaintiff's complaint, a cause of action for a violation of §1 of the Sherman Act (15 U.S.C. 1) may have been inferred. The court notes, however, that plaintiff's attorney failed to adequately investigate further and plead such an action even after the court dismissed plaintiff's complaint. This was in total disregard to the court's directive as to specific defects in plaintiff's complaint. Regardless, sanctions would not be properly imposed if there could have been at least a colorable cause of action for a violation of §1 of the Sherman Act.

Similarly, the court finds that had plaintiff undertaken sufficient investigation and paid more attention to details and specificity in its complaint, plaintiff and its attorneys could have stated allegations which would at least have inferred a conspiracy to violate §1 of the Sherman Act under Count 2 of plaintiff's amended complaint.

The court, upon a review of the affidavits and pleadings, cannot so find on Count 3 of plaintiff's complaint alleging a conspiracy to or attempt to monopolize in violation of §2 of the Sherman Act (15 U.S.C. 2). The court can gleam no evidence which even suggests that defendants alone or in conspiracy with each other had the

intent to monopolize the market, nor that the defendants individually or as a group had the power to do so.

The standard to be used by the court in applying Rule 11 is to "test the signer's conduct by inquiring what was reasonable to believe at the time the pleading . . . was submitted." *Id.*, Advisory Committee Notes. In total disregard of the court's dismissal of this claim, plaintiff's attorney did little to further investigate the basis upon which to bring these allegations. The decision in *Andre v. Merrill Lynch Ready Assets Trust*, 97 F.R.D. 699, 702 (S.D.N.Y. 1983), supports the appropriateness of sanctions against a party and counsel who ignore events subsequent to the filing of their complaint. *Id.* Likewise, plaintiff and its attorneys failed to act on the advice of the court stated in the Memorandum and Order dated June 28, 1985, which noted the defects in plaintiff's complaint. Accordingly, the court finds that it was unreasonable for plaintiff and its attorneys to believe that a claim of attempt to monopolize or conspiracy to monopolize existed based on the very limited investigation done by plaintiff's attorney and the incomplete information received from the defendants. Further, the court notes that plaintiff and its attorneys did little to clean up its complaint before filing a little-changed amended complaint basically furthering the same facts. The court therefore finds that plaintiff and its attorneys should be responsible for the costs associated with all defendants' motions to dismiss the amended complaint.

Upon a review of the record, the court finds that the lack of reasonable inquiry into the substantive causes of action is not the sole basis for imposing sanctions. Based on the affidavits submitted by the twelve defendants who

sought a dismissal for improper venue, plaintiff and its attorneys had no reasonable grounds for submitting the Missouri defendants into this court's forum. There is no suggestion in any paper before the court that any inquiry was made by plaintiff to lend some assurance that the allegations of venue were well grounded in fact. *See Viola Sportswear, Inc. v. Mimun*, 574 F. Supp. 619, 621 (E.D.N.Y. 1983). Therefore, the court finds that plaintiff and its attorneys should also be responsible for any costs associated with those twelve defendants filing motions for improper venue.

The City of Olathe has also filed a motion for sanctions. The court recognizes that a court should only impose sanctions where it is patently clear that a claim has absolutely no chance of success. *Eastway Construction Corp. v. City of New York*, 1985-1, CCH Trade Cases, 66, 634 (2nd Cir. 1985). As far as the City of Olathe is concerned, it is clear that no claim may be made against it for damages. Plaintiff's attorneys should have made reasonable inquiry into the law regarding the City's liability before requesting damages from all defendants in the complaint and amended complaint. There is no legal basis upon which to impose liability for damages against the City. Therefore, plaintiff's attorneys should be responsible for the costs to the City in defending its motion to dismiss plaintiff's claim for damages against it.

The court also finds that sanctions should be imposed against plaintiff and its attorneys for its claims against Newcomer's Sons, Inc. [sic] The affidavits of the defendant, uncontested by plaintiff, conclusively establishes that Newcomer's does not own the individual cemeteries

of Floral Hills, Floral Hills East and Cameron Memory Gardens, but rather that it owns stock of Floral Hills Property Corporation, a separate entity which owns the above-listed cemeteries. Defendant alleged no liability on the part of Newcomer's Sons, Inc. [sic] due to the alter-ego doctrine, and failed to adequately respond to Newcomer's memorandum in support of its motion to dismiss, which refuted liability under such a doctrine.

The court further finds that plaintiff and its attorneys did not properly investigate its allegations against Jas. H. Matthews Company. The amended complaint does not allege that Matthews is the manufacturer of granite memorials, but still alleges that the tied products involved in the market involve both bronze and granite memorials. There are absolutely no facts which support plaintiff's allegation in paragraph twenty-one (21) that the relevant product market is bronze *and* granite grave memorials. There are no facts which support that any of the defendants manufactured or controlled the granite market and that specifically Jas. H. Matthews sought to restrain trade or monopolize the granite market. The affidavits submitted by Matthews negate any contention by plaintiff that a sufficient amount of investigation was made either prior to the filing of the complaint or prior to the filing of the amended complaint. The court finds no support in plaintiff's cite to a 1958 litigation involving Matthews Company for support for its claim against it in this case. *See Florida Monument Builders v. All Faiths Memorial Gardens*, No. 83-2362-Civil (S.D. Fla., *unpublished*, Dec. 28, 1984).

In conclusion, the court finds it unreasonable for plaintiff to have filed an amended complaint without clearing up the defects cited by the court in its order of

dismissal of the original complaint. The court therefore finds it is proper for sanctions to be imposed upon plaintiff and its attorneys for reasonable attorneys' costs associated with each of the defendants' motions to dismiss for improper venue and Count 3 of plaintiff's complaint, as well as the City of Olathe's dismissal of damage claims against it and costs associated with the five defendants' motions to impose sanctions.

IT IS BY THE COURT THEREFORE ORDERED that the motions of defendants Temple B'Nai Jehudah, Brooking Cemetery Association, D.W. Newcomer's Sons, Catholic Cemeteries Association of Kansas City-St. Joseph, Inc., Memorial Heritage, Inc., Mount Washington Cemetery, Troost Avenue Corporation, Reorganized Church of Jesus Christ of Latter Day Saints, Elmwood Cemetery, Blue Ridge Lawn Cemetery, Inc., Highland Sales & Investment Company, Inc., and Memorial Park Cemetery Association of Missouri to dismiss for improper venue are hereby granted. IT IS FURTHER ORDERED that defendants' motions to dismiss plaintiff's amended complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, are hereby granted. IT IS FURTHER ORDERED that plaintiff and its attorneys are and shall be liable to defendants for their reasonable attorneys' fees and costs incurred in the defense of their motions to dismiss Count 3 of plaintiff's amended complaint and their motions for sanctions based on plaintiff's amended complaint. IT IS FURTHER ORDERED that plaintiff and its attorneys are and shall be liable to the twelve defendants for their reasonable attorneys' fees and costs incurred in defending their motions to dismiss for

improper venue. IT IS FURTHER ORDERED that plaintiff and its attorneys are and shall be liable to the defendant City of Olathe for reasonable attorneys' fees and costs associated with that defendant's motion to dismiss plaintiff's claim in its amended complaint for damages against it. This liability shall be joint and several between plaintiff and its attorneys in their individual capacities. Defendants are directed to submit, within twenty (20) days of the date this memorandum and order is filed, affidavits which provide the court with the information on reasonable attorneys' costs associated with the defense of their motions to dismiss and motions for sanctions in response to plaintiff's amended complaint. IT IS FURTHER ORDERED that plaintiff's amended complaint is hereby dismissed with prejudice.

DATED: This 25th day of February, 1986, at Kansas City, Kansas.

/s/ Dale E. Saffels
DALE E. SAFFELS
United States District Judge

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MONUMENT BUILDERS OF GREATER KANSAS CITY, INC.,

Plaintiff-Appellant,

v.

AMERICAN CEMETERY ASSN. [, CEMETERY ASSN.] OF KANSAS, CEMETERY ASSN. OF MISSOURI, JAS. H. MATTHEWS & CO., SHAWNEE MISSION MEMORY GARDENS, PLEASANT VIEW CEMETERY, CITY OF OLATHE, KANSAS dba Olathe Memorial Cemetery, MOUNT MUNCIE CEMETERY, MOUNT CALVARY CEMETERY, CATHOLIC CEMETERIES, ARCHDIOCESE OF KANSAS CITY, KANSAS dba Mount Calvary Cemetery (Kansas City, KS) dba Saint John's Cemetery (Kansas City, KS) dba Saint John's Cemetery (Lenexa, KS) dba Saint Joseph Cemetery dba Resurrection Cemetery, HERITAGE PARKS, INC. dba

No. 86-1497

FILED
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Memorial Park Cemetery)
and Sunset Memorial)
Gardens of Kansas City,)
Kansas, MAPLE HILL)
CEMETERY COMPANY,)
HIGHLAND PARK CEMETERY)
AND CHAPEL MAUSOLEUM,)
INC. dba Highland Park)
Cemetery, CHAPEL HILL)
MEMORIAL GARDENS, INC.,)
MEMORIAL HERITAGE, INC.)
dba Barry Memorial Gardens)
dba White Chapel Memorial)
Gardens dba Summit Heights)
Memorial Gardens dba Johnson)
County Memorial Gardens,)
D.W. NEWCOMER'S SONS)
dba Floral Hills Funeral Home)
and Cemetery dba)
Floral Hills East Cemetery dba)
Cameron Memory Gardens,)
WOODLAND CEMETERY OF)
INDEPENDENCE, MISSOURI,)
TEMPLE B'NAI JEHUDAH dba)
Rosehill Cemetery, MOUNT)
WASHINGTON CEMETERY, a)
benevolent corporation,)
CATHOLIC CEMETERIES ASSN.)
OF KANSAS CITY –)
ST. JOSEPH INC. dba)
Resurrection Cemetery of)
North Kansas City dba Mount)
Olivet Cemetery Assn. dba)
Mount Saint Mary's Cemetery)
Association, REORGANIZED)
CHURCH OF JESUS CHRIST)
OF LATTER DAY SAINTS dba)

Mound Grove Cemetery,)
GLENDRIDGE CEMETERY, INC.,)
LINCOLN CEMETERY, INC.,)
MEMORIAL PARK CEMETERY)
ASSN. OF MISSOURI dba)
Green Lawn Cemetery dba)
Memorial Park Cemetery,)
TROOST AVENUE CEMETERY)
CO. dba Forest Hill)
Cemetery dba Calvary)
Cemetery, ELMWOOD)
CEMETERY, EAST SLOPE)
MEMORIAL GARDENS)
CEMETERY, THE BROOKING)
CEMETERY ASSN. dba Brooking)
Cemetery, BLUE RIDGE LAWN)
CEMETERY, INC. dba Blue)
Ridge Lawn Memorial Gardens,)
HIGHLAND SALES & INV. CO.,)
INC. dba Highland Cemetery,)
MOUNT MORIAH CEMETERY, INC.)
dba Mount Moriah Cemetery)
South dba Mount Moriah)
Terrace Park, SUNSET)
MEMORY GARDENS OF)
LEAVENWORTH, and all others)
similarly situated, and OAK)
LAWN MEMORIAL GARDENS,)
)
Defendants-Appellees.)

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 84-2469-S)

Before SEYMOUR and McWILLIAMS, Circuit Judges, and BOHANON,* District Judge.

SEYMOUR, Circuit Judge.

Plaintiff Monument Builders of Greater Kansas City, Inc. is a trade association of independent grave marker builders and dealers. It brought this suit in the district of Kansas on behalf of several independent dealers in the Kansas City area against a large number of local cemeteries, two local cemetery associations, a national cemetery association, and a national manufacturer of bronze monuments. In its complaint, Monument Builders alleges that defendants conspired to engage in various anti-competitive practices in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1988). The district court dismissed the claims against a number of defendants located in Missouri on the basis of improper venue in the district of Kansas. It dismissed the remaining defendants under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim under either section of the Sherman Act. It also awarded certain defendants attorneys fees under Rule 11. *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Assn.*, 629 F. Supp. 1002 (D. Kan. 1986). We reverse the dismissal for lack of venue and failure to state a claim, and reverse in part the awards of fees.

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* The Honorable Luther L. Bohanon, Senior Judge for the United States District Court for the Western District of Oklahoma, sitting by designation.

I.

In reviewing a dismissal under Rule 12(b)(6), we must accept all the allegations in the complaint as true. *See Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1371 (10th Cir. 1979). What follows is a description of the complaint viewed through this forgiving lens.

At the heart of Monument Builders' complaint is a conspiracy among the various defendants to drive independent sellers of grave markers out of the market by forcing purchasers of cemetery plots to buy their marker from the cemetery of their choice. This plan has been implemented through a variety of anti-competitive devices, taking two primary forms: an outright prohibition by cemeteries against the installation of markers not purchased from the cemetery, and various surcharges assessed against customers who choose to purchase their markers from an independent dealer. For example, a cemetery might charge a plot purchaser who chooses not to buy the marker from the cemetery a high fee for installation of the marker or for care and upkeep of the marker. Thus a person desiring to buy a plot in a particular cemetery is either prohibited outright from purchasing a marker elsewhere, or is faced with prohibitively expensive surcharges which would not be assessed if the marker were purchased from the cemetery.[1]

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[1] Although these allegations form the focus of the complaint, they are not an exhaustive description of the practices with which defendants are charged. Monument Builders also alleges that some cemeteries require bronze monuments to be composed of a certain alloy, and require customers desiring to

(Continued on following page)

Monument Builders brought its suit against thirty cemetery owners in the Kansas City area, thirteen of which own cemeteries only in Kansas, sixteen of which own cemeteries only in Missouri, and one of which owns cemeteries in both states. According to the complaint, approximately 70-75% of interments each year in the Kansas City area take place in these cemeteries. Monument Builders also sued the American, Kansas, and Missouri Cemetery Associations, and Jas. H. Matthews, Inc., a national manufacturer of bronze markers.

Count I of the complaint, brought against all defendants except Matthews, alleges that the local cemeteries horizontally conspired to engage in the anti-competitive practices described above, and that the practices constituted a tying arrangement that unreasonably restrained trade in violation of section 1 of the Sherman Act. In Count II, Monument Builders alleges that Matthews and the local and national cemetery associations conspired with the cemetery operators by advising, coordinating, and encouraging them to implement the challenged practices. In Count III, Monument Builders alleges that all the previously described conduct constitutes a "conspiracy

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(Continued from previous page)

install bronze monuments purchased elsewhere to have their marker tested at an independent laboratory. It also charges defendants with refusing to state the prices of markers separately from the prices of plots; assessing recording and bookkeeping fees not assessed against other customers; depriving customers of independent dealers of certain services that they perform for other customers, such as providing grave locations upon request; and imposing a variety of other lesser burdens on customers of independent dealers.

and/or attempt" by all defendants to monopolize in violation of section 2 of the Sherman Act.

After granting Monument Builders leave to amend its complaint, the district court dismissed with prejudice a number of Missouri cemetery operators for lack of venue. The court found that these defendants did not "reside" or "do business" in the district of Kansas for purposes of the antitrust venue statutes, 15 U.S.C. §§ 15, 22 (1988), and that Monument Builders' claim against these defendants did not "arise" in the district of Kansas for purposes of the general federal question venue statute, 28 U.S.C. § 1391 (1982). It dismissed defendant D.W. Newcomer's Sons as an improper party.

Finally, the court dismissed the remaining defendants for failure to state a claim. The court held the allegations of conspiracy to be too vague and conclusory. Although the complaint alleged that defendants possessed 70-75% of the burial market, the court held the allegations of market power to be insufficient to support a claim of "forcing" with respect to the tying claim or of "dangerous probability of success" with respect to the attempted monopolization claim. The court based this holding both on the dilution of the market percentage by the dismissal of the Missouri defendants and on the lack of allegations concerning the market power possessed by individual defendants. The court also dismissed any claim for damages against the City of Olathe[2] based on the Local

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[2] The City was sued as an owner and operator of a local cemetery.

Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (1988), which immunizes local governments from damages liability in federal antitrust cases.

The court awarded attorneys fees in favor of various defendants based on the insufficiency of the complaint, the lack of venue, Monument Builder's claim against an improper party, and the bringing of a damages claim against an immune city government. Monument Builders appeals the dismissals for want of venue and for failure to state a claim under Rule 12(b)(6), and the resulting sanctions.[3] We address each claim of error in turn.

II.
VENUE

The district court granted the motions of twelve Missouri defendants to dismiss for lack of venue, concluding that none of these defendant corporations resided or transacted business in Kansas and that the alleged antitrust violations did not occur in Kansas. The unusual circumstances of this case create a difficult venue issue. We conclude, however, that the court's dismissal of the Missouri defendants for lack of venue was in error.

After accepting affidavits, the district court held that the Missouri defendants were not inhabitants of Kansas and were neither found in Kansas nor transacting

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[3] Plaintiff appeals neither the dismissal of D.W. Newcomer's Sons as an improper party, nor the dismissal of damage claims against the City of Olathe.

business there within the meaning of sections 4[4] and 12[5] of the Clayton Act. *Monument Builders*, 629 F. Supp. at 1005-06 (relying on *United States v. Scophony Corp.*, 333 U.S. 795, 807 (1948)). Monument Builders does not contest this portion of the decision. Instead, it contends that the general venue statute, 28 U.S.C. § 1391(b), which provides for venue in the district where the claim arose, supplements the Clayton Act and can provide for venue in situations where the provisions of the Clayton Act alone would not. The Missouri defendants agree, Supplemental Brief of Missouri Appellees at 10, as they must, because we have long recognized that special venue statutes in general, and section 12 of the Clayton Act in particular, are supplemented by the venue provisions applicable to all civil cases. *Board of County Comm'rs. v. Wilshire Oil Co.*, 523 F.2d 125, 130 (10th Cir. 1975); 15 C. Wright, A. Miller

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[4] "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 15(a) (1988).

[5] "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business."

15 U.S.C. § 22 (1988).

& E. Cooper, *Federal Practice & Procedure* § 3818 at 175 (2d ed. 1986) ("[I]t is now clear beyond any doubt that the general venue statutes apply to antitrust cases."); *cf. Pure Oil Co. v. Suarez*, 384 U.S. 202, 204-05 (1966) (special venue statutes are supplemented by more liberal general venue statute, absent specific contrary indication).

The district court referred to the general venue statute in a paragraph addressing the motions of some of the Missouri defendants, but held that venue does not exist because "plaintiff has not sufficiently alleged or proven facts which even infer [sic] that the violation of the antitrust laws by these two defendants occurred in Kansas." *Monument Builders*, 629 F. Supp. at 1006. However, the court also stated that "the ultimate test is whether these defendants are engaged in the 'practical, everyday business or commercial concept of doing or carrying on business "of any substantial character"' within the district." *Id.* at 1005 (quoting *United States v. Scophony Corp.*, 333 U.S. 795, 807 (1948)). When it addressed the claims of the majority of the defendants, the district court explicitly applied only the *Scophony* test. In 1948, the general venue statute was narrower than the venue provisions of the Clayton Act, making *Scophony* the most expansive test by which a plaintiff could establish venue. The 1966 amendment to the general statute broadened the relevant standard by providing for venue in the district where the claim arose. Consequently, *Scophony* can no longer be described as the ultimate test.

Monument Builders argues that under the circumstances of this case, its claim against the Missouri defendants arose in Kansas within the meaning of section

1391(b), the general venue statute. The Missouri defendants respond that because the sale of grave sites involves the sale of real property which by definition occurs at a specific place, the claim could only arise at the place of sale. Since they sold grave sites only in Missouri, they argue that any claim against them must have arisen in Missouri. Monument Builders' claim, however, is not that the sale of each grave site injured it in a way in which a federal court can grant relief. Rather, its claim is founded upon the allegation that through an illegal agreement or conspiracy, the Kansas and Missouri cemeteries in the greater Kansas City area are adversely affecting consumer welfare by foreclosing competition in the market for grave marker sales and installation. Monument Builders' claim arises because it has allegedly been foreclosed from competing in that market and is therefore granted the power to sue, in a fashion similar to a private attorney general, under the federal antitrust statutes. The claim arises not from an individual cemetery's sale of graves, but from the alleged illegal conduct's adverse impact on consumer welfare within the relevant market. Because this market covers both Kansas and Missouri, the alleged antitrust violation occurs in both Kansas and Missouri.

We begin our inquiry into the appropriate venue for such a claim by briefly outlining the development and interpretation of the relevant venue statutes. Prior to 1966, the general venue provisions for federal question cases permitted a plaintiff to bring suit only in the district where the defendant resided. The venue provisions in the Clayton Act were "designed to aid plaintiffs by giving them a wider choice of venues, and thereby to secure a

more effective, because more convenient, enforcement of antitrust prohibitions." *United States v. National City Lines, Inc.*, 334 U.S. 573, 586 (1948); *Wilshire Oil Co.*, 523 F.2d at 130 ("It is . . . the purpose of 15 U.S.C. § 22 to liberalize rather than restrict venue in antitrust actions . . . ."). This expansion of venue was not limitless. Congress took care not to grant antitrust

> "plaintiffs the power to bring suit and force trial in districts far removed from the places where the company was incorporated, had its headquarters, or carried on its business. . . . Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice. . . . But neither was it willing to allow defendants to hamper or defeat effective enforcement by claiming immunity to suit in the districts where by a course of conduct they had violated the Act with the resulting outlawed consequences."

National City Lines, 334 U.S. at 588.

In 1966, Congress amended the general venue statute, expanding the available forums in all federal question cases. Unlike the special antitrust venue statute, which was designed to aid plaintiffs, this amendment was designed to make federal litigation more convenient for *all* parties. The Court explained the effect of the amendment as follows:

> "There have been . . . occasional gaps in the venue laws, *i.e.*, cases in which the federal courts have jurisdiction but there is no district in which venue is proper. One such gap arose in connection with cases involving multiple plaintiffs and defendants. Venue was fixed at the residence of the defendant . . . . When there were multiple . . . defendants, the district of residence for venue purposes was the districts

> [sic] where . . . *all* the defendants reside. If they resided in different districts then there was no proper venue. In 1966 Congress acted to close the gap with a provision authorizing suit where 'the claim arose,' which in most cases provides a proper venue even in multiple-party situations. The development supports the view that Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap."

Brunette Mach. Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 710 n.8 (1972) (citations omitted).

In *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), the Court addressed the limits of the 1966 venue expansion and held that it did not close all venue gaps. The Court stated that the plaintiff's desire to bring only one suit in a local forum was not necessarily sufficient to create venue under section 1391(b), 443 U.S. at 183, and that the limits of the expanded general venue statute were to be determined without reference to the convenience of the plaintiff, *see id.* at 185.

Nonetheless, the Court left open the possibility that unusual cases might exist in which a plaintiff would have a choice of venue because the claim arguably arises in more than one district.

> "[I]n the unusual case in which it is not clear that the claim arose in only one specific district, a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility – in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the

> defendant (but not of the plaintiff) – may be assigned as the locus of the claim."

Id. at 185. In one such case, the Fifth Circuit asserted that "[i]t is often impossible to isolate one judicial district as the district where the claims arose. Recent jurisprudence has recognized such difficulties, consistently holding that the exercise of determining the single district where the claim arose is sometimes unnecessary and unrealistic." *Checki v. Webb*, 785 F.2d 534, 537 (5th Cir. 1986).

This is also such an unusual case. Applying the principles discussed above, we conclude that venue is proper in Kansas. Courts have recognized that venue may be "equally 'correct' in other judicial districts, while determining that venue was proper in their own districts." *Checki*, 785 F.2d at 538. Although venue would be appropriate against the Missouri defendants in a Missouri district court, we believe that venue is also appropriate in the district of Kansas, based on the factors set out in *Leroy*, 443 U.S. at 185.

Thus, independent dealers and defendant cemeteries are both located in and, reading the complaint in the light most favorable to Monument Builders, attract customers from the Kansas City metropolitan area. This area happens to be divided by the Kansas/ Missouri state line, but it nonetheless appears to be the relevant geographic market for the products and services at issue in this case.[6]

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[6] At this stage, we are not determining the relevant market for substantive antitrust law purposes. Monument Builders' allegation in its complaint that the greater Kansas City area is the relevant geographic market should be presumed correct for venue purposes at this early stage in the proceedings, especially absent a contrary assertion by the Missouri defendants.

The availability of witnesses and the accessibility of relevant evidence argue as plausibly for venue in Kansas as in Missouri. Indeed, at oral argument, counsel for the Missouri defendants admitted that his clients would suffer virtually no hardship if required to proceed in Kansas. In addition, these defendants have never suggested that a Missouri district court (or any other for that matter) would be a superior forum in which to try this case. On the contrary, the Kansas defendants could have raised identical arguments had Monument Builders filed the case in Missouri. The thrust of defendants' argument is that the venue statute requires two separate suits in this situation. However, they are unable to articulate any reason why two identical, simultaneous suits should be required here, and their interpretation of the venue statute would leave a gap requiring duplicative litigation in at least two separate suits, a result Congress has clearly attempted to avoid. In sum, the claim can rationally be said to have arisen in Kansas as well as Missouri, and the factors the Court articulated in *Leroy* do not indicate that the statute should be interpreted to forbid venue in Kansas under the unique facts of this case.[7] We thus conclude that venue exists as to all defendants.

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[7] If it later becomes apparent that persons residing in Kansas do not venture to Missouri to purchase cemetery plots, nor Missourians to Kansas, then the complexion of the suit would change. The court would then be faced with two distinct markets having different relevant characteristics. Completely different sets of evidence might be applicable to an evaluation of Monument Builder's claims. If this indeed proves to be the case, it might to appropriate under section 1391(b) to allow this suit to proceed against only the Kansas defendants. *See* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3827 at 275-76 (2d ed. 1986). At this early stage in the proceedings, we need not address this issue.

III.

DISMISSAL FOR FAILURE TO STATE A CLAIM

The district court found plaintiff's allegations of conspiracy and of market power to be insufficient. Both of these concepts are critical to all of plaintiff's claims. Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of a modern complaint is "to give opposing parties fair notice of the basis of the claim against them so that they may respond to the complaint, and to apprise the court of sufficient allegations to allow it to conclude, if the allegations are proved, that the claimant has a legal right to relief." *Perington Wholesale*, 631 F.2d at 1371. To dismiss under Rule 12(b)(6), "The trial court must conclude 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* at 1372 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). With the above standards in mind, we address in turn the sufficiency of the counts charged in the complaint.

A. Conspiracy to Restrain Trade

In Count I, Monument Builders charges defendant cemeteries and cemetery associations with a horizontal conspiracy to restrain trade in violation of section 1 of the Sherman Act. We must determine whether the complaint makes sufficient allegations of conspiracy, and whether it alleges illegal practices under section 1.

> "The pleading standard set by Rule 8(a)(2) does not change from case to case . . . . However,

> while the pleading standard does not vary, what constitutes sufficient notice to enable a defendant to formulate a responsive pleading does change from case to case. To provide adequate notice, a complaint in a complex, multi-party suit may require more information than a simple, single party case."

Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383, 1386-87 (10th Cir. 1980). In *Mountain View*, which defendants cite heavily, we dismissed portions of a multi-party antitrust conspiracy complaint as inadequate. The differences between the *Mountain View* complaint and that filed by Monument Builders are striking. The plaintiffs in *Mountain View* sued a large number of drug companies for unfair trade practices in relation to certain products. In none of their claims did the plaintiffs specify which defendants and products were involved with which practices. For example, the allegations of a tying arrangement did "not identify the offending defendants, the injured parties, the tied products, or the tying products." *Id.* at 1387. The allegations of price fixing similarly failed to specify which of the twenty-eight defendants fixed prices on which of the hundreds of products the defendants collectively manufactured. *Id.* at 1388.

The complaint in this case does not approach this level of imprecision. Monument Builders specifies the tied product, the tying product, and provides a lengthy list of allegedly anti-competitive practices defendant cemeteries agreed to put into effect. *See* Amended Complaint, rec., vol. VI, doc. 223, at 11-17. In this respect, the complaint is much more like the one we approved in *Perington Wholesale*, where we found it enough that "the conduct complained of . . . [was] adequately specified,

and the allegation of conspiracy related to that conduct." 631 F.2d at 1372.

Defendants protest that the allegations of conspiracy are conclusory in that the complaint fails to specify facts constituting direct evidence of an agreement connecting individual defendants, either directly or inferentially, to the implementation of the conspiracy. *See* Brief filed by Appellees American Cemetery Association, Mount Moriah Cemetery, and Chapel Hill Memorial Gardens at 17-20. However, "[w]hether the allegation is called conclusory, as it is, or factual, as it is also, is not determinative." *Perington Wholesale*, 631 F.2d at 1372. What is determinative is whether "[in] this case it cannot be said that defendants did not have fair notice of [Monument Builders'] claims, or that beyond doubt the plaintiff would be unable to prove the claim of conspiracy." *Id.*

Defendants' assertion that further specific facts are needed to make this complaint sufficient to state a claim is contrary to the substantive law of antitrust conspiracy as well as modern federal pleading standards. It is well accepted that conspiracy may be proven by circumstantial evidence. *See* 2 J. Von Kalinowski, *Antitrust Laws & Trade Regulation*, § 6.01[3][a][i] at 6-29 (1989). Although defendants are correct in pointing out that parallel behavior *alone* does not set out a claim of conspiracy, parallel behavior may support such a claim when augmented by "additional evidence from which an understanding among the parties may be inferred." *Id.* § 6.01[3][a][ii] at 6-36. Such evidence may include a showing that the parties "are acting against their own individual business

interests, or that there is motivation to enter into an agreement requiring parallel behavior." *Id.* at 6-37.[8]

Although plaintiff has pleaded virtually no facts that would constitute direct evidence of an agreement, it has made sufficient circumstantial allegations to overcome the minimum requirements of Rule 8(a). In paragraphs 24 and 25 of the complaint, Monument Builders lists the prohibition against independent installation, as well as a number of surcharges assessed by defendant cemeteries against customers of independent monument dealers, as

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[8] Defendants cite with frequency to the Supreme Court's decisions in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Both cases held that in the face of ambiguous circumstantial evidence of agreement, an antitrust plaintiff must come forward with "evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 477 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764). The Court did not intend to end reliance on circumstantial proof of conspiracy, but rather to avoid reliance exclusively on evidence which is "as consistent with permissible competition as with illegal conspiracy." *Matsushita*, 435 U.S. at 588; *Monsanto*, 465 U.S. at 764. In their briefs, defendants offer no reasoning by which we could conclude that their alleged conduct was as consistent with legitimate business purposes as with collective effort to close independent dealers out of the market. More importantly, Monument Builders alleges that the practices have no other business purpose than to stifle competition from independent dealers.

Neither *Monsanto* nor *Matsushita*, which reached the Court after a full trial in one case and considerable discovery in the other, control fully at the pleading stage. Although the rules of those cases are ones antitrust plaintiffs must ultimately satisfy, we cannot conclude that Monument Builders can prove no set of facts which would support its claim of conspiracy.

practices that are allegedly intended to disadvantage such dealers. *See* rec., vol. VI, doc. 223, at 11-17. Plaintiff also alleges, *inter alia*, that defendant cemeteries enforce onerous installation rules regarding placement of monuments purchased from independent dealers which are markedly different from the rules applied to placement of their own monuments. Plaintiff alleges that these practices and the other alleged practices "bear no reasonable relation to the operation and maintenance of a cemetery." *Id.* at 17. Under these circumstances, we cannot say beyond doubt that plaintiff can prove no set of facts that would support the claim that defendant cemeteries entered into a "contract, combination or conspiracy" to engage in these practices.[9] We thus turn to whether the allegations listed, reviewed under the same standards, support a claim that the practices alleged constitute an illegal conspiracy in restraint of trade under section 1.

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[9] The Eighth Circuit recently reviewed dismissal of a complaint apparently almost identical to the one here, and found the allegations of conspiracy sufficient:

> "The complaint in this case alleges that the appellee cemeteries agreed to engage in tying arrangements in order to force cemetery lot customers to buy their memorials and installation services from the appellee cemeteries. The nature of the tying devices used is set forth in detail, ranging from rules flatly requiring the lot customer to deal only with the cemetery, to a variety of rules allegedly designed to erect barriers to independent memorial retailers and installers. The appellee trade associations are alleged to have participated in the conspiracy by recommending the restrictve (sic) rules complained of. Baxley-DeLamar has alleged (albeit minimally) 'facts

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The trial court read the complaint as describing only a tying arrangement. A tying arrangement arises when a seller requires the purchaser of one product (the tying product) to also purchase another, distinct product (the tied product). "[C]ertain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *'per se.'* " *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 9 (1984). A tying arrangement is presumed illegal if it meets three criteria:

> "First, purchases of the tying product must be conditioned upon purchases of a distinct tied product. Second, a seller must possess sufficient power in the tying market to compel acceptance of the tied product. Such power exists where market share is high, or where a seller offers a unique or otherwise desirable product which competitors cannot economically offer themselves. Finally, a tying arrangement must foreclose to competitors of the tied product a 'not insubstantial' volume of commerce."

Fox Motors, Inc. v. Mazda Distrib. (Gulf) Inc., 806 F.3d 953, 957 (10th Cir. 1986) (citations omitted). The risk posed by such arrangements is that the tied product will be purchased not on its competitive merits but because of its

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constituting the conspiracy, its object and accomplishment'. *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979). Therefore, Baxley-DeLamar satisfied the minimal pleading requirements of Rule 8. *See Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d. 1383, 1386-88 (10th Cir. 1980).

Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n, 843 F.2d 1154, 1156 (8th Cir. 1988).

relationship to the tying product, thus depriving consumers of a competitive choice and unfairly disadvantaging competitors in the market for the tied product. *See Jefferson Parish Hosp.*, 466 U.S. at 12. The trial court held that Monument Builders failed to allege sufficient market power to support a claim that cemeteries could force purchasers of plots to buy markers also. The court based its conclusion on the complaint's failure to specify the market shares of individual cemeteries, and on the dilution of the alleged collective 70-75% market share by the dismissal of the twelve Missouri defendants.

Market power, for purposes of supporting a claim of forcing, is proven "[w]hen the seller's share of the market is high, or when the seller offers a unique product that competitors are not able to offer." *Jefferson Parish Hosp.*, 466 U.S. at 17 (citation omitted). Monument Builders alleges in its complaint both that defendants' share of the market was high and that the uniqueness of specific plots along with the "defendant cemeteries' special relationship with purchasers of such spaces," give the cemeteries sufficient power in the market for plots to restrain competition in the market for markers. Rec., vol. VI, doc. 223, at 11. Monument Builders also alleges that the effect of the defendants' actions has been to curtail competition in the market for markers, to deprive consumers of a competitive choice of markers, and to cause buyers to pay higher prices for markers. *Id.* at 12.

The Eighth Circuit recently held allegations identical to these sufficient to state a tying claim under section 1. *See Baxley-DeLamar Monuments v. American Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988). The Eighth and Ninth Circuits have found proof of similar allegations to

support a tying claim.[10] *See Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1140-46 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1213-18 (9th Cir. 1977).

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[10] Our holding is also supported by the Supreme Court's decision in *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700 (1969). The Court reversed the grant of summary judgment to the defendants in a case similar to this one, based on the following conduct:

> " '(1) Despite the unskilled nature of the work, all of the memorial parks refuse to permit the plaintiff to install markers sold by it; all of them insist that the work be done by the cemeteries themselves.
>
> " '(2) None of the memorial parks charges lot owners a separate installation fee in the case of markers purchased from the cemeteries.
>
> " '(3) All of the memorial parks require the payment of an installation fee by the plaintiff for installing markers purchased from the plaintiff. The plaintiff plausibly maintains that the actual cost of installation comes to about $3. Yet, enormous installation fees are charged plaintiff * * * .
>
> " '(4) All of the memorial parks require a specific alloy content in the bronze markers installed, and reserve the right to reject non-conforming markers. The alloy content requirement happens to be the same as manufacturer Matthews' markers and the same as is implicitly suggested in a pamphlet ("Modern Cemeteries") distributed by Matthews to its customers. All of the memorial parks except Roosevelt are customers of Matthews.

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We therefore cannot say beyond doubt that Monument Builders can prove no set of facts supporting a claim that defendants engaged in a per se illegal tying arrangement.[11]

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" '(5) There is evidence that Greenlawn, Woodlwan (sic) and Princess Anne have attempted to dissuade lot owners from purchasing markers from the plaintiff. The affidavit of plaintiff's president states that numerous other incidents of this nature have occurred.

" '(6) Defendant Matthews, in its pamphlet "Modern Cemeteries," suggests a number of practices which in effect erect competitive barriers to retailers other than the cemeteries themselves.

" '(7) Many of these practices have been adopted by the memorial park defendants, as evidenced by affidavits in the record, and by the "rule books" of Rosewood, Princess Anne and Greenlawn.

" '(8) There is evidence of numerous visits to and conferences with the memorial parks by sales representatives of Matthews.' "

Id. at 701-02 (quoting *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 404 F.2d 1008, 1012-14 (4th Cir. 1968) (Craven, J., dissenting)). Allegations of conduct identical or similar to that set out in all but paragraphs 5 and 8 are found in Monument Builders' complaint.

[11] The trial court failed to address whether, even if plaintiff's claims do not amount to a per se illegal tying arrangement, defendants do in fact unreasonably restrain trade, thus violating section 1 under the rule of reason. Monument Builders may prevail if it can satisfy this more fact-bound test. *See Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 29 (1984). The trial court should address this issue on remand should it become necessary.

In Count II, Monument Builders describes no new anti-competitive activities, but claims that defendant cemetery associations (Kansas, Missouri, and American) and the Jas. H. Matthews Company encouraged, advised, and coordinated the cemeteries in the formulation and implementation of the practices described in Count I, all in violation of Sherman Act section 1. In addition to making conclusory allegations regarding Matthews' actions, Monument Builders also alleges that Matthews formulated many of the allegedly anti-competitive practices described in Count I. *See* rec., vol. VI, doc. 223, at 22-23. Although this portion of the complaint is unquestionably not drawn in the most artful manner, it does give adequate notice to Matthews and the cemetery associations of the role each is charged with playing in the conspiracy. *See Baxley-DeLamar Monuments*, 863 F.2d at 1156. We therefore conclude that the district court erred in dismissing this count under Rule 12(b)(6).

B. Sherman Act Section 2 Conspiracy to Monopolize

The district court dismissed Count III, which alleges a violation of section 2 of the Sherman Act, because *Monument Builders* failed to make sufficient allegations of either market power or conspiracy. The court noted that while Monument Builders alleges that defendant cemeteries controlled 70-75% of the interment market, it makes no allegations regarding the monument market. Although Monument Builders alleges that Matthews controlled a significant portion of the national market in bronze markers, the court pointed out that "nowhere does plaintiff

allege that any of the defendants, including Jas. H. Matthews Company, hold market strength over granite markers." *Monument Builders*, 629 F. Supp. at 1010.

Monument Builders styled Count III as "conspiracy and/or attempt" to monopolize. "However, it appears that [plaintiff] actually pleaded a conspiracy to monopolize, rather than a number of individual attempts to monopolize." *Baxley-DeLamar Monuments*, 843 F.2d at 1157 (assessing virtually identical complaint). The district court was correct in noting that no individual is alleged to have attempted, on its own, to monopolize the relevant market. Nonetheless, we conclude that the complaint does state a claim for conspiracy to monopolize.

"Conspiring to monopolize is a separate offense under section 2, requiring less in the way of proof than the other section 2 offenses." *Perington Wholesale*, 631 F.2d at 1377. For example, the "market power in a 'relevant market' need not be proved." *Id.* A plaintiff must show conspiracy, specific intent to monopolize, and overt acts in furtherance of the conspiracy. *See id.*; *Baxley-DeLamar Monuments*, 843 F.2d at 1157. As we have outlined above, Monument Builders makes sufficient allegations of conspiracy and overt acts committed pursuant thereto. It also alleges that defendants intended to monopolize the Kansas City market for grave markers. *See* rec., vol. VI, doc. 223, at 24. We therefore hold that the district court erred in dismissing this count under Rule 12(b)(6).

IV.

SANCTIONS

The district court awarded various defendants attorneys fees for four reasons. First, it concluded that the

amended complaint does not support a cause of action, and that plaintiff did not sufficiently investigate the facts prior to filing the lawsuit. The court believed these deficiencies were exacerbated by Monument Builders' failure to improve its complaint when it was given an opportunity to amend. Second, the court found no justification for suing the Missouri defendants in the district of Kansas. Third, the court found that an antitrust damages action against the City of Olathe was untenable in light of the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36. Fourth, the court imposed attorney's fees in favor of D.W. Newcomer's Sons because Monument Builders alleged that Newcomer's owned and operated three Missouri cemeteries, when in fact it owned the stock of property companies that in turn owned the cemeteries.

Rule 11 mandates sanctions against attorneys and/or their clients when pleadings, motions, or other signed papers in the district court are not well grounded in fact, are not warranted by existing law or a good faith argument for its extension, or are filed for an improper purpose. Fed. R. Civ. P. 11. We will overturn an award of sanctions under Rule 11 only if it constitutes an abuse of discretion. *See Adamson v. Bowen*, 855 F.2d 668, 673 (10th Cir. 1988); *Burkhart v. Kinsley Bank*, 852 F.2d 512, 515 (10th Cir. 1988). Rule 11 imposes an obligation on the signer of a pleading to conduct a reasonable inquiry into whether the pleading is legally frivolous or factually unsupported. *See Medical Emergency Serv. Assoc. v. Foulke*, 844 F.2d 391, 399-400 (7th Cir. 1988); *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 557 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 83, 85 (1987).

Because of our holdings on the merits, sanctions based on improper venue and insufficiency of the complaint must be reversed.[12] The district court did not abuse its discretion, however, by finding that Monument Builders and its attorney could have discovered, after reasonable inquiry, that Newcomer's did not directly operate the cemeteries it allegedly operated. Accordingly, the sanction based on that ground is affirmed. Monument Builders has not appealed the award of sanctions to the City of Olathe.[13]

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[12] The district court ordered sanctions when it dismissed the complaint, but it did not set the amount of the sanctions until after the notice of appeal was filed. Defendants argue that because plaintiff's notice of appeal was filed before the trial court's final determination on sanctions, this court does not have jurisdiction over the issue. The notice of appeal was filed before this court's decision in *Phelps v. Washburn Univ.*, 807 F.2d 153 (10th Cir. 1986). Therefore, the rule announced in that case does not apply and we may exercise jursidiction (sic) over the trial court's award of sanctions. *See Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1512 (10th Cir. 1987).

[13] On appeal, Monument Builders concedes that it is not entitled to antitrust damages against the City of Olathe, but challenges the dismissal of its claim for injunctive relief against that defendant. The City of Olathe has filed a motion for sanctions on appeal under Fed. R. App. P. 38, alleging that the appeal against it is frivolous. To the contrary, Monument Builders' argument with respect to the dismissal of its claim for injunctive relief, far from being frivolous, has prevailed on appeal. Accordingly, the motion for sanctions on appeal is denied.

V.

CONCLUSION

The trial court's dismissal of this action for improper venue and for failure to state a claim is reversed. The awards of attorneys fees based on improper venue and the inadequacy of the complaint are also reversed. The award of attorneys fees in favor of D.W. Newcomer's Sons is affirmed. The case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.